Supreme Court, U.S.
FILED
SEP 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

Number 86-262

In The
Supreme Court of the United States

OCTOBER TERM, 1986

U.A. 198 HEALTH & WELFARE,
EDUCATION & PENSION FUNDS,
Petitioners,

VERSUS

RESTER REFRIGERATION SERVICE, INC.
Respondent.

Brief in Opposition to Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

*James H. Gill, Jr.
Daniel K. Rester
CAMP, CARMOUCHE,
BARSH, GRAY,
HOFFMAN & GILL
Sixth Floor
2431 S. Acadian Thruway
P. O. Drawer 4407
Baton Rouge, Louisiana 70821
(504) 928-6800
Attorney for Respondent

*Counsel of Record

85

TABLE OF CONTENTS

Page

Question Presented ii

Table of Authorities iii

Statement of the Case 1

Summary of Argument 4

Response to Reasons for Granting the Writ 5

Conclusion 19

Certificate 20

QUESTION PRESENTED

Does the Federal District Court or the National Labor Relations Board have primary jurisdiction to determine the issue of the necessity of an employer to continue to pay into an Employee Benefit Trust Fund after expiration of the Collective Bargaining Agreement which had previously existed between the Employer and the Union, and more importantly, whether or not the discontinuance of these payments by the employer is an issue which arises under the requirements of §8(a)(5) of the National Labor Relations Act, as amended, 29 U.S.C. 158(a)(5), making it an issue to be decided by National Labor Relations Board, or is it a requirement of §§502 and 515 of Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§1132 and 1145, making it an issue to be decided by the Federal District Court?

TABLE OF AUTHORITIES

Cases: *Page*

Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489, 515-17 n. 11 (5th Cir. 1982), *cert. denied*, 464 U.S. 932, 104 S.Ct. 335, 78 L.Ed.2d 305 (1983) 17
Cement Masons Health and Welfare, etc., v. Kirkwood-Bly., 520 F.Supp. 194 (N.D. Calif. 1981) aff'd. 692 F.2d 641 (9th Cir. 1982) ... 7, 9, 11
Hinson v. NLRB, 428 F.2d 133 (8th Cir. 1970) 5, 6
I.A.M. Nat'l. Pension Fund v. Schulze Tool & Div. Co., Inc., 564 F.Supp. 1285 (N.D. Cal. 1983) 9
Laborers Health & Welfare Fund v. Hess, 594 F.Supp. 273 (N.D. Cal. 1984) 9
Laborers Health and Welfare Trust Fund For Northern California v. Advanced Lightweight Concrete Company, Inc., 779 F.2d 497 (9th Cir. 1985) 11, 12, 13, 16, 17
Local Union No. 25, International Brotherhood of Teamsters v. New York, New Haven and Hartford Co., 350 U.S. 155, 160, 76 S.Ct. 227, 230, 100 L.Ed. 166 (1956) 16
Mill Cabinet Health & Welfare Fund for Matheson Calif. v. Kitchen Fixtures, Inc., (C-82-0974 SW) (JSB) Unpublished 9
Mo-Kan Teamsters Pension Fund v. Botsford Ready Mix, 605 F.Supp. 1441 (W.D. Mo. 1985) 2, 11, 12, 13, 14
Moldovan v. Great Atlantic and Pacific Tea Company, Inc., 790 F.2d 894 (3rd Cir. 1986) ... 17
NLRB v. Katz, 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962) 5, 11, 12
Office of Professional Employees Insurance Trust Fund v. Laborers Funds Administrative Office of Northern California, Inc., 783 F.2d 919 (9th Cir. 1986) 16, 17

Page

Pattern Makers' Pension Trust Fund v. Badger Pattern Works, Inc., 615 F.Supp. 792 (N.D. Ill. E.D. 1985) 15

Peerless Roofing Co. v. NLRB, 641 F.2d 739 (9th Cir., 1981) 6

Plumbers and Steamfitters Local 298 v. County of Door, 359 U.S. 354, 357-58, 79 S.Ct. 844, 846, 3 L.Ed.2d 872 (1959) 17

Rosen v. Hotel and Restaurant Employees and Bartenders Union, 637 F.2d 592, 600 (3d. Cir. 1981), *cert. denied*, 454 U.S. 898, 102 S.Ct. 398, 70 L.Ed.2d 213 (1982) 17

San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959) 6

Smith v. Evening News Association, 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed.2d 246 (1962) 7

U.A. 198 Health & Welfare, Education & Pension Funds v. Rester Refrigeration Service, Inc., 790 F.2d 423 (5th Cir. 1986) 14, 17

U.A. 198 Health & Welfare, Education and Pension Fund v. Rester Refrigeration Service, Inc., 612 F.Supp. 1033 (D.C. La. 1985) 14

Statutes:

Sections 502 and 515 of the Employee Retirement Income Security Act; 29 U.S.C. §§1132 & 1145 ..... 3, 4, 9, 10, 12, 13, 18

Section 4212(a) of the Employee Retirement Income Security Act; 29 U.S.C. §1392(a) ... 10, 12

Section 301 of the Labor Management Relations Act; 29 U.S.C. 185(a) 5, 6, 7, 8, 15

Section 302(c)(5) of the Labor Management Relations Act; 29 U.S.C. 186(c)(5) 15

Section 8(a)(5) of the National Labor Relations Act, as amended; 29 U.S.C. 158(a)(5) 2, 4, 5, 7, 8, 10, 18

Number 86-262

In The
Supreme Court of the United States

OCTOBER TERM, 1986

U.A. 198 HEALTH & WELFARE,
EDUCATION & PENSION FUNDS,
Petitioners,

VERSUS

RESTER REFRIGERATION SERVICE, INC.
Respondent.

Brief in Opposition to Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

STATEMENT OF THE CASE

Rester Refrigeration Service, Inc. (RESTER) is a Baton Rouge, Louisiana based employer. Rester was a signatory to a collective bargaining agreement with the United Association Local 198. The collective bargaining agreement expired on April 30, 1984 and Rester has not signed a new agreement.

The bargaining agreement, while it was in effect, required Rester to pay into U.A. Health & Welfare Education & Pension Fund periodic payments and contribu-

tions. When the collective bargaining agreement expired and an impasse in collective bargaining was reached with Local 198, Rester discontinued making such contributions.

Rester was current in its schedule of payments through April 30, 1984. Rester began its own negotiations with Local 198 on April 10, 1984, April 19, 1984 and April 26, 1984. The negotiations fell into an impasse and were stopped after the April 26, 1984 meeting. No formal negotiations have occurred since that date.

This action was then filed by plaintiff, United Association Local 198 Health & Welfare, Education & Pension Funds, on April 2, 1985. Rester filed a Motion for Summary Judgment and/or Motion to Dismiss for lack of subject matter jurisdiction. The District Court granted Rester's Motion on the grounds that the complaint failed to state a claim upon which relief could be granted and held that no federal court jurisdiction existed for an action of this kind.

As stated in the Petitioner's Statement of the Facts, the District Court relying on *Mo-Kan Teamsters Pension Fund v. Botsford Ready Mix Company*, 605 F.Sup. 1441 (W.D. Mo. 1985) felt that the primary issue was whether or not an impasse was reached between Rester and the Union. Rester's failure to prove an impasse would require Rester to continue to make payments to the fringe benefit funds as a requirement for the satisfaction of §8(a)(5) of the National Labor Relations Act (NLRA). The District Court felt that under § 8(a)(5) the National Labor Relations Board (NLRB) had primary jurisdiction to determine all alleged employer unfair trade practices, one

of which clearly could be the failure of an employer to pay into the employee benefits trust fund after the expiration of the collective bargaining agreement but prior to an impasse. The District Court reviewed the requirements of §§502 and 515 of Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§1132 and 1145 and determined that even though these sections provided for federal court jurisdiction in the collection of contributions from employers into employee benefit trust funds during the existence of a collective bargaining agreement that they do not provide the district court with additional jurisdiction over issues which arose after the expiration of that agreement. The District Court concluded, and rightly so, that collective bargaining agreements cease to exist on their expiration date and do not survive for the purpose of giving the District Court jurisdiction under the above cited ERISA statutes. The District Court further concluded that an attempt to impute definitions supplied for a different Part of the Employee Retirement Income Security Act, which definitions might be interpreted to suggest that §§502 and 515 of ERISA were intended to control the jurisdictional question in issues which arose after the expiration of the collective bargaining agreement, would not be sound statutory construction.

The Fifth Circuit Court of Appeals affirmed the District Court decision after reviewing all issues and decided that the primary concern in this matter would be the issue of whether or not the parties had reached an impasse and whether or not the employer had committed an unfair labor practice. The Court felt that there was no statutory language in ERISA which would compel the court to replace the primary jurisdiction accorded the NLRB in

these issues with Federal Court jurisdiction as provided by ERISA in §515. The Court of Appeals also felt that you clearly could not engraph the definitions of one part of the ERISA statute, which definitions were exclusively for that Part of the statute, to another Part in order to stretch the jurisdictional authority of the Federal District Courts into issues which exclusively involve an alleged unfair labor practice under §8 of the NLRA.

It is from these decisions that the plaintiff has taken its Application for Writs to this Honorable Court.

SUMMARY OF ARGUMENT

This suit alleges that Rester failed to make contributions to an Employee Benefit Trust Fund that were required originally under the terms of an expired collective bargaining agreement. This alleged failure to make such contributions, if established by Petitioner as occurring prior to an impasse, would be an unfair labor practice on the part of Rester, see 29 U.S.C. 158(a)(5); §8(a)(5) NLRA. It is clear that all such alleged unfair labor practices which are arguably subject to the provisions of §8 of the NLRA would be referred to the NLRB. However, Petitioner argues that under this fact situation the alleged breach by Rester would fall within the Federal Court's jurisdiction under §§502 and 515 of the Employee Retirement Income Security Act; 29 U.S.C. 1132 & 1145. Contrary to Petitioner's arguments, at least three Federal District Courts and three different Circuit Courts of Appeal have decided that the proper jurisdiction for such action would lie with the NLRB since the cause of action arose as a result of the requirements of §8(a)(5) and not as a result of the "survival" of an expired collective bargaining agreement.

RESPONSE TO REASONS FOR GRANTING THE WRIT

The complaint originally filed in this matter asserted jurisdiction of the Federal Courts through Section 301 of the Labor Management Relations Act (LMRA); 29 U.S.C. 185 and under §§502 and 515 of the Employee Retirement Income Security Act (ERISA); 29 U.S.C. 1132 and 29 U.S.C. 1145. The Petitioner has however, abandoned its claim that the Federal Courts have jurisdiction of this matter under authority provided by §301 of the LMRA.

In reviewing the question of jurisdiction between the Federal Courts and the NLRB, in general, it is clear that traditionally, the NLRB has maintained jurisdiction over questions of "unfair labor practices" as set forth under 29 U.S.C. §158; §8 NLRA.

Under Section 29 U.S.C. §158(a)(5); Section 8(a)(5) NLRA, the overwhelming jurisprudence has been interpreted to require that an employer maintain the status quo of the employees, including the conditions of employment and fringe benefits, during the collective bargaining process.[1] See *NLRB v. Katz*, 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962). This requirement is mandatory even after the expiration of the collective bargaining agreement, See *Hinson v. NLRB*, 428 F.2d 133 (8th Cir. 1970).[2]

---

[1] The pertinent part of 29 U.S.C. §158 (a)(5) states:

"(a) It shall be an unfair labor practice for an employee . . .

(5) to refuse to bargain collectively with the representatives of his employer . . ."

[2] The Court in *Hinson*, supra, stated:

"The spirit of the National Labor Relations Act and the more persuasive authorities stand for the proposition that, even after

The Court in *Hinson*, supra, as well as other courts[3] have also said that despite the necessity of maintaining the status quo during collective bargaining, that the collective bargaining agreement did not survive its expiration date but its provisions survived in limited form only because of the NLRA. The Court in *Hinson*, supra, stated:

> "The order does not compel petitioner to agree to any new or different contract provision; it simply requires him to abide by an obligation once extant by reason of the binding contract but then continuing on after its expiration, in limited form, not by reason of the contract itself but because of the dictates of the policy embodied in the National Labor Relations Act."

In general, therefore, the Courts have stated that violations of 29 U.S.C. 158 must be heard before the NLRB and the District Courts would have no jurisdiction to consider these matters, see *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed. 2d 775 (1959).

An exception to the above, however, developed through Section 301 LMRA; 29 U.S.C. 185, wherein the Federal Court was given jurisdiction to enforce the provisions of collective bargaining agreements, in particular, 29 U.S.C. 185 (a).[4] The jurisprudence then began

---

expiration of a collective bargaining contract, an employer is under an obligation to bargain with the Union before he may permissibly make any unilateral change in the terms and conditions of employment."

[3] See also, *Peerless Roofing Co. v. NLRB*, 641 F.2d 739 (9th Cir., 1981).

[4] Section 301(a) of LMRA 29 U.S.C. 185(a) states in part:
"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affect-

turning to dual jurisdiction between Federal Courts and NLRB in the enforcement of collective bargaining agreements which may also include the determinations of an unfair labor practice issue. The Courts seemed to imply that just because there may have been an unfair labor practice [§8(a)(5)] arising out of the breach of a collective bargaining agreement that it did not mean that the Federal Court would not have jurisdiction. The Courts initially felt that Section 301 LMRA would provide such jurisdiction to the Federal Courts despite the possibility of an unfair labor practice. See *Smith v. Evening News Association*, 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed. 2d 246 (1962). Therefore, the conflict arose as to how to handle the particular fact situation we have in this matter, i.e., the possible failure of an employer to maintain the status quo after the expiration date of a collective bargaining agreement, which would again bring into conflict an alleged unfair labor practice and the enforcement of the purposes behind the expired collective bargaining agreement.

The first case to squarely face this issue was *Cement Masons Health and Welfare, etc. v. Kirkwood-Bly.*, 520 F.Supp. 194 (N.D. Calif. 1981), affirmed 692 F.2d 641 (9th Cir. 1982) wherein the Court stated:

> "Defendant argues that any claim plaintiffs have for trust fund contributions arise by virtue of section 8(a)(5) of the Act. The Garmon doctrine vests primary jurisdiction of cases arising under the Act in the

---

ing commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

N.L.R.B. Thus, defendant urges that we dismiss the action. Plaintiffs, quoting language similar to what is quoted above, argue that the contract itself survives its expiration date. Hence, they argue that this is a suit under section 301—to enforce a collective bargaining agreement—and is therefore properly in the district court.

We believe that defendant's characterization is correct for several reasons. Most importantly, plaintiffs' suit depends entirely upon the existence of section 8(a)(5) which requires the employer to maintain the status quo during negotiations for a new collective bargaining agreement. This is obviously done in reference to the prior agreement, and, therefore, the collective bargaining agreement can be said to "survive" its expiration. However, it does so only because of section 8(a)(5). Plaintiffs cite no case, nor can we find any, which have permitted district courts to enforce properly expired collective bargaining agreements in a section 301 action.

Indeed, extensive research reveals that all cases establishing the principle that the employer must continue trust payments even after the expiration of the agreement arose from N.L.R.B. proceedings."

This Court put to rest this issue by declaring that the NLRB would maintain jurisdiction for actions which arose under this factual situation because it was *not* a cause of action which arose under a collective bargaining agreement, as required under Section 301, since the collective bargaining agreement would not survive its own termination date. The Court stated that the collective bargaining agreement would only be used to provide the perimeters to establish the status quo requirement under Section 8(a)(5) NLRA.

This decision then brought on new attempts to es-

tablish Federal Court jurisdiction under the present fact situation by using the provisions of §§502 and 515 of the Employee Retirement Income Security Act (ERISA); 29 U.S.C. 1132 and 29 U.S.C. 1145.[5] Section 502 provides Federal Court jurisdiction for an action which arose under §515.

Although in *Kirkwood-Bly., Inc.*, supra, the Court acknowledged the possible ERISA action under a similar fact situation it did not decide such an issue. In an early decision, the Federal Court in *I.A.M. Nat'l. Pension Fund v. Schulze Tool & Div. Co., Inc.*, 564 F.Supp. 1285 (N.D. Cal. 1983) did decide a case with similar issues involved but there was no jurisdictional questions raised and therefore, it was not considered.[6]

The first case to face this specific issue and relied on almost exclusively by petitioner is *Laborers Health & Welfare Fund v. Hess*, 594 F.Supp. 273 (N.D. Cal. 1984). This Court specifically set forth two basic propositions on which it relied on in reaching a decision that there was Federal Court jurisdiction over this particular fact situation. The Court felt that (1) the definition of "obligations

---

[5] In particularly §515 provides:
"Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement."

[6] In addition, the unpublished case of *Mill Cabinet Health & Welfare Fund for Matheson Calif. v. Kitchen Fixtures, Inc.*, (C-82-0974 SW) (JSB) as cited in Footnote 5 of *Laborers Health & Welfare Fund v. Hess*, 594 F.Supp. 273 (N.D. Cal. 1984) decided that the Federal Court did not have jurisdiction over a Section 515 allegation involving an expired collective bargaining agreement, but there also, the Court gave no authority for its decision.

to contribute" as defined in 29 U.S.C. §1392(a) should be used to define the employers obligation to contribute under §515 and that (2) the use of the phrase in §515 " . . . Under the terms . . ." should require that an obligation to contribute under the terms of an expired collective bargaining agreement would also fall under the jurisdiction of the Federal Court.[7]

---

[7] For clarification the *Hess* court said in regards to number 1 above:

"Plaintiffs have, however, observed that in the part of ERISA dealing with employer withdrawals, the term 'obligation to contribute' is defined as 'an obligation to contribute arising . . . (1) under one or more collective bargaining (or related) agreements, or (2) as a result of a duty under applicable labor-management relations law.' 29 U.S.C. §1392(a) (1982) (emphasis added). From that definition, and from the absence of a definition of 'obligation to contribute' in the subchapter of ERISA including section 515, plaintiffs properly conclude that the phrase 'obligated to make contributions' in section 515 includes an obligation to contribute arising under section 8(a)(5) of the NLRA.

and in regards to number 2 above:

"But, contrary to plaintiffs' assertions, that conclusion is not by itself sufficient to compel the further determination that section 515 applies to employers whose obligations to contribute arises from section 8(a)(5) of the NLRA. Rather, an examination of the remainder of the statutory language is necessary to determine whether it imposes any limitations on the language 'employer . . . obligated to make contributions.' If, for instance, the statute mandated the payment of contributions by '[e]very employer who is obligated to make contributions under a collective bargaining agreement,' it would be clear that an obligation arising as a result of section 8(a)(5) would not be covered. Examination of the statute reveals, however, that there is no such limitation. The statute dictates that '[e]very employer who is obligated to make contributions . . . under the terms of a collectively bargained agreement shall . . . make such contributions.' (Emphasis added) Congress's decision to speak in terms of 'obligations under the terms of a collective bargaining agreement,' rather that 'obli-

Following the *Hess* decision, the Courts in the Western District of Missouri, *Mo-Kan Teamsters Pension Fund v. Botsford Ready Mix*, 605 F.Supp. 1441 (W.D. Mo. 1985), and the Ninth Circuit, *Laborers Health and Welfare Trust Fund For Northern California v. Advanced Lightweight Concrete Co., Inc.*, 779 F.2d 497 (9th Cir. 1985), both under similar fact situations, issued opinions which contradicted *Hess*. The Court in *Botsford*, supra, states after review of the *Hess* decision, that the operative reason why the Federal Courts should not have jurisdiction in this matter was the lack of a contract (collective bargaining agreement) once the agreement has expired, even though there are maintenance of "status quo" requirements.[8]

---

gations under a collective bargaining agreement,' suggests that it meant to include obligations arising as a result of section 8(a)(5) of the NLRA. Cf. Kirkwood-Bly, 520 F.Supp. at 945 (section 8(a)(5) obligation to continue trust fund contributions after expiration of collective bargaining agreement arises under the terms of the agreement not under the agreement itself)."

[8] The Botsford Court stated:
"Section 8(a)(5) implicitly requires an employer to maintain the status quo during negotiations for a new collective bargaining agreement even though the prior agreement has come to an end. *N.L.R.B. v. Katz*, 369 U.S. 736, 743-44, 82 S.Ct. 1107, 111-12, 8 L.Ed.2d 230 (1962). The status quo, of course, will be heavily dependent on the terms of the prior agreement. Thus it is sometimes said that the terms of the agreement "survive" the expiration of the agreement. See e.g. *Cement Masons Health & Welfare Trust Fund v. Kirkwood-Bly, Inc.*, 520 F.Supp. 942 (N.D. Cal. 1981). Nonetheless, it is the status quo, and not the terms of the written contract that must be maintained. Unilateral changes of conditions without prior discussion with the union are prohibited, not because of any agreement on the employer's part, but because to allow such changes would enable an employer to circumvent the duty to negotiate and frustrate the ob-

In addition, the Court, in *Advanced*, supra, reviewed the two main issues presented in the *Hess* decision and stated that it felt that the *Botsford* decision clearly pointed out that §1392(a) definitions expressly refer only to the withdrawal liability set forth in that Part of the ERISA statute. The Court further felt that Congress intended the definitions set forth in §1392(a) should remain with and refer only to withdrawal liability instead of expending the liability created under §515 and " . . . a more plausible conclusion is that Congress intended withdrawal liability to be more broadly based than employers' general liability for ERISA violations". In other words, Congress' failure to make it perfectly clear that the definitions were to be applied to more than one Part of the statute meant that the more broadly interpreted definitions provided for under withdrawal liability §1392(a) should not be applied to §515 liability which Part does not have a similar definition and is obviously intended by Congress to be more narrowly interpreted.

The Court in *Advanced*, supra, further stated in regard to the *Hess* decision that the use of the phrase ". . . under the terms . . ." in §515 without any further definitions obviously meant that Congress intended §515 liability be less extensive than the withdrawal liability set forth under §1392(a)(1) under the definitions ". . . obli-

---

jectives of §8(a)(5). *Katz*, at 369 U.S. 743, 82 S.Ct. 1111. Once a union has been offered a chance to negotiate on a mandatory issue, and an impasse is reached, an employer may put into effect changes which were the subject of negotiation, but which were not agreed to. When it is considered that one of the terms of the contract was the expiration date, it is clear that the 8(a)(5) status quo requirement exists in spite of and not because of, the literal terms of the contract.

gations to contribute . . .". The *Botsford*, supra, Court felt that, "[T]here is no reason to believe that Congress would use an ambiguous, metaphysical concept to define an obligation [in section 515] when it has used a crystal clear definition elsewhere [in section 1392] in the same act.".

Finally, the Court in *Advanced*, supra, commented on one final portion of the *Hess* decision wherein that Court relied heavily upon statements made in hearings by Congressional sponsors of proposed §515. Petitioner in this matter also relies heavily on these Congressional hearings in an effort to interpret the intent behind §515. The Court, in *Advanced*, supra, felt that there was no indication existing in the Congressional hearing that indicated that Congress considered the problem of continuing obligations from expired agreements much less that it had any view on resolving any conflict between §515 and the primary jurisdiction of the NLRB. In fact, in footnote 12, the Court in *Advanced*, supra, specifically points out that under one committee hearing it appears that there was an attempt to limit the jurisdiction of §515 and in another hearing that opposite view seemed to prevail.[9] See

---

[9] Advanced refers to a staff report to the responsible Senate Committee which states that § 515's purpose was to avoid "complex litigation concerning claims and defenses unrelated to the employer's promise and the Plan's entitlement to the contributions." Senate Committee on Labor and Human Resources, 96 Cong., 2d Sess. 44 (Comm.Print 1980). Advanced asserts that this demonstrates Congressional intent to limit § 515 to pure contractual obligations not obligations continued by the mandates of other statutes. A contrary interpretation of Congressional intent might be gleaned from a statement of both sponsors of the bill: "The bill imposes a Federal statutory duty to contribute on employers that are already obligated to make contributions to multiemployer plans." 126 Cong.Rec. 23039 (statement of Rep. Thompson); *id.* at 23,288 (statement of Sen. Williams). This statement may suggest that the source of the employer's

also Judge Parker's comments in *U.A. 198 Health & Welfare, Education and Pension Fund v. Rester Refrigeration Service, Inc.*, 612 F.Supp. 1033 (D.C. La. 1985) regarding the *Hess* decision[10] and the comments of Judge Wisdom in *Rester*, supra, Footnote 17[11].

---

obligation is irrelevant to his duty to contribute.

Both analyses are plausible, especially when the highlighted phrases are examined out of context. In truth, no conclusion concerning Congressional intent over the availability of § 515 in a situation such as this could be proper given the absence of any indication that Congress was aware of the potential for conflict between § 515 and §§ 7 and 8 of the NLRA.

[10] "This Congress has declared that the definition in Section 1392 is 'for purposes of this part'. Application of a definition found in one part of a statute to a different part of the statute, when the Congress has specifically limited the definition to the one part, is not sound statutory construction. *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086, 98 S.Ct. 1281, 55 L.Ed.2d 792 (1978). Nor can this court discern a difference in the meaning of an 'obligation under the terms of an agreement' and an 'obligation under an agreement'. Neither phrase incorporates an 'obligation imposed by labor-management relations law' and both are restricted to obligations arising from the agreement. As noted above, this court is unconvinced that an agreement which by its own terms has fully expired can "survive" or create any obligation in the absence of some such provision in the agreement—in which case it would not be fully expired.

Without repeating the detailed analysis contained in both judicial opinions, this court sides with the result in *Mo-Kan Teamsters Pension Fund v. Botsford Ready Mix Co.*, supra. If the Congress had intended to confer jurisdiction upon the district courts to enforce payment of all employee fringe benefit contributions whether obligated "under the terms of a collectively bargained agreement" or "under the provisions of any section of the National Labor Relations Act," it would have said so. It did not."

[11] Both sponsors of the bill stated that it "imposes a Federal Statutory duty to contribute on employers that are already obligated to make contributions to multiemployer plans". 126 Cong. Rec. 23039 (statement of Rep. Thompson); *id.* at 23288 (statement of Sen. Wil-

Under Part I of Petitioner's Reasons for Granting of the Writ, they ask the Court to make one final consideration worthy of the Court's attention. Petitioner implies that the fact that the requirements of §302(c)(5) of the LMRA, which requires that the details of employee benefit trust funds be set forth in separate agreements, might breathe life into those agreements after the expiration of the related collective bargaining agreement. There has been no indication in these proceedings that the employee benefit trust fund would have survived as a separate agreement outside the collective bargaining agreement Rester executed. The Court facing this issue in *Pattern Makers' Pension Trust Fund v. Badger Pattern Works, Inc.*, 615 F.Supp. 792 (N.D. Ill. E.D. 1985) stated that ". . . jurisdiction over suits based on a separate trust agreement was not proper under §301 of the NLRA because a trust agreement 'does not qualify as a contract between an employer and labor organization under NLRA §301(a).'". It is likewise clear in this matter that without the collective bargaining agreement there would have been no separate trust agreement in existence and the trust agreement whether or not it contained the specific terms of the payments of benefits to the trust, still expired as far as Rester was concerned upon expiration of the collective bargaining agreement. See, *Office and*

---

liams). The Committee Print states that § 515 is intended to prevent "complex litigation concerning claims and defenses unrelated to the employer's promise and the Plan's entitlement to the contributions." Senate Comm. on Labor and Human Resources, 96th Cong., 2nd Sess. at 44 (Comm. Print 1980). The statements in the Congressional Record, taken alone, might be viewed as supporting the Fund's position. The statement in the Committee Print, taken alone, might be viewed as supporting the employer's position. We decline to attach great significance to either statement.

Professional Employees Insurance Trust Fund v. Laborers Funds Administrative Office of Northern California, Inc., 783 F.2d 919 (9th Cir. 1986).

Petitioner in Part II of its Reasons for Granting of the Writ would have this Court believe that the trust and the trustees would be negligent in their duty by seeking to enforce whatever remedies it feels it is entitled to before the NLRB. Petitioner would have this Court believe that the NLRB's procedures are slow, cumbersome, dilatory and unreceptive to the needs of the trustees. Quite to the contrary of petitioner's belief, the Courts have time and time again made it perfectly clear that it is the expertise of the NLRB, to determine the key issue in this matter, i.e. whether or not an impasse has been reached and whether or not there has been an unfair labor practice, which are required to provide a fair determination of the issue. The ultimate decision in this case will be based on facts and minute details which must be weighed with the expertise of the NLRB in order to reach a fair and just decision.

The trustees have every right to seek payment, if they feel they are entitled, of the contributions by an employer subsequent to the expiration of a collective bargaining agreement. The Court in *Advanced*, supra, made it perfectly clear that there is no bar to the Trust Fund filing for unfair labor practices,[12] nor would the trustees

---

[12] "Denying district court jurisdiction to the trust funds need not prejudice their claims against Advanced. There is no bar to the trust funds' filing an unfair labor practice charge against Advanced. 29 U.S.C. § 160(b); 29 C.F.R. § 102.9 ('A charge that any person has engaged in or is engaging in an unfair labor practice affecting commerce may be made by any person.'); *see Local Union No. 25, International Brotherhood of Teamsters v. New York, New Haven and*

be breaching their fiduciary duty to the beneficiaries of the trust by seeking relief under the NLRA through the NLRB.[13]

Therefore to request that this Court change the traditional jurisdiction with regard to unfair labor practices from the NLRB to the District Court based on the alleged cumbersome procedures and the potential inequitable results which may be derived from use of the NLRB is totally without merit and would place the responsibility on the District Court to make decisions in an area which has been, by legislative design, left to the NLRB.

It is therefore clear that three Circuit Courts, the 9th Circuit[14], the 5th Circuit[15] and the 3rd Circuit[16] have all

---

Hartford Co., 350 U.S. 155, 160, 76 S.Ct. 227, 230, 100 L.Ed 166 (1956) (railroad may file unfair labor practice charge); *Plumbers and Steamfitters Local 298 v. County of Door*, 359 U.S. 354, 357-58, 79 S.Ct. 844, 846, 3 L.Ed.2d 872 (1959) (county may file charge); *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 515-17 n. 11 (5th Cir. 1982), *cert. denied*, 464 U.S. 932, 104 S.Ct. 335, 78 L.Ed.2d 305 (1983) ('[A]ny person, even a stranger to the collective bargaining agreement, can bring unfair labor practice charges.')

[13] "The availability of an NLRB remedy to the trust funds obviates any potential fiduciary liability of the trustees to the fund beneficiaries caused by the dismissal of the §515 suit. *See Rosen v. Hotel and Restaurant Employees and Bartenders Union*, 637 F.2d 592, 600 (3d. Cir. 1981), *cert. denied*, 454 U.S. 898, 102 S.Ct. 398, 70 L.Ed.2d 213 (1982); *Kaufman*, 707 F.2d at 416.

[14] See, *Laborers Health and Welfare Trust Fund For Northern California v. Advanced Lightweight Concrete Company, Inc.*, 779 F.2d 497 (9th Cir. 1985) and *Office and Professional Employees Insurance Trust Fund v. Laborers Funds Administrative Office of Northern California, Inc.*, 783 F.2d 919 (9th Cir. 1986).

[15] See, *U.A. 198 Health & Welfare, Education & Pension Funds v. Rester Refrigeration Service, Inc.*, 790 F.2d 423 (5th Cir. 1986).

[16] See, *Moldovan v. Great Atlantic and Pacific Tea Company, Inc.*, 790 F.2d 894 (3rd Cir. 1986).

agreed that §515 while giving rise to Federal Court jurisdiction on enforcement of the collection of trust fund payments does so only through the existence of a valid collective bargaining agreement. The fact that §8(a)(5) of the NLRA requires that an employer maintain the status quo after the expiration of a collective bargaining agreement and the fact that the jurisprudence has stated that payment into a trust fund can be part of that status quo, does not breathe life back into a "dead" collective bargaining contract. The mere fact that the terms of an expired collective bargaining agreement may be used as the perimeters for establishing the status quo, does not provide a "contract" which is required for the Federal Courts to have jurisdiction under a §515 action.

CONCLUSION

The District Court and the Fifth Circuit Court of Appeals properly maintained Rester's Motion to Dismiss because the action itself properly lies with the National Labor Relations Board; neither the LMRA nor ERISA, under the circumstances presented to the Court, gives rise to federal subject matter jurisdiction. Rester suggests that this Court uphold the correctness of the District Court's decision and that this writ be denied.

Respectfully submitted:

CAMP, CARMOUCHE,
BARSH, GRAY, HOFFMAN &
GILL

BY: _____

JAMES H. GILL, Jr.*
Daniel K. Rester
2431 S. Acadian Thruway,
6th Floor
P. O. Drawer 4407
Baton Rouge LA 70821-4407
(504) 928-6800

*Counsel of Record

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari on all counsel of record by placing same in the United States mail, postage prepaid and properly addressed.

BATON ROUGE, ~~LOUISIANA~~, this 18 day of September, 1986.

DANIEL K. RESTER

B-8689, 9-86, 50